Filed 12/30/04 Universal Savings Bank v. Bankers Standard Ins. Co. CA2/3
Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

UNIVERSAL SAVINGS BANK, Plaintiff and Appellant, v. BANKERS STANDARD INSURANCE COMPANY et al., Defendants and Respondents.	B159239 (Los Angeles County Super. Ct. No. KC033262)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed in part, reversed in part.

Huron Law Group, Jeffrey Huron, David K. Johnson; Huron Maki & Johnson and Craig Wu for Plaintiff and Appellant.

Horvitz & Levy, Lisa Perrochet, Karen M. Bray; Cannon & Nelms, Anthony L. Cannon and Adam L. Fullman for Defendant and Respondent Bankers Standard Insurance Company.

Wilson, Kenna & Borys and Lawrence Borys for Defendant and Respondent Antron Insurance Agency, Inc.

United Savings Bank (Bank) appeals a judgment of nonsuit in favor of Bankers Standard Insurance Company (Insurer) and Antron Insurance Agency, Inc. (Agent). Bank contends it is a standard loss payee under a property insurance policy issued to its borrower, rather than a simple loss payee, and is entitled to coverage for loss of insured personal property. Bank also contends the exclusion of evidence relating to the loss was error. We conclude that the defendants are entitled to nonsuit on the counts for ordinary breach of contract and reformation only, and are not entitled to nonsuit on the counts for breach of contract based on estoppel, breach of the implied covenant of good faith and fair dealing, and negligence. We therefore affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Superior Plastic Injection Corporation (Superior Plastic) manufactured plastic products. Superior Plastic borrowed over $2 million from Bank and granted Bank a security interest in its personal property.

Insurer issued to Superior Plastic as insured a commercial property and general liability insurance policy including coverage for its personal property "against the risk of direct physical loss or damage by any cause of loss" other than causes specifically excluded. "Mysterious disappearance of property" and "Dishonest act or omission done either by you or your 'employees' . . . or by anyone authorized to act for you" were among the exclusions.

A policy endorsement states three alternative loss payable provisions in favor of a party other than the insured. Provision A, designated "LOSS PAYABLE PROVISION," states that for covered property in which both the insured and the loss payee have an insurable interest, Insurer will adjust losses with the insured and pay any claim jointly to

the insured and the loss payee "as interests may appear."[1] This is commonly referred to as a simple loss payable provision. Provision B, designated "LENDER'S LOSS PAYABLE PROVISION," states that the loss payee is a creditor and that for covered property in which both the insured and the loss payee have an insurable interest, the loss payee is entitled to payment even if Insurer denies a claim by the insured, provided that the loss payee satisfies certain conditions.[2] This is commonly referred to as a standard

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[1] "For covered property in which both you and a loss payee shown in the Schedule or in the Declarations have an insurable interest, we will: [¶] 1. Adjust losses with you; and [¶] 2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear."

[2] "1. The Loss Payee shown in the Schedule or in the Declarations is a creditor (including a mortgageholder or trustee) with whom you have entered into a contract with [*sic*] for the sale of covered property, whose interest in that covered property is established by such written contracts as: [¶] a. Warehouse receipts; [¶] b. A contract for deed; [¶] c. Bill of lading; or [¶] d. Financing statements[.]

"2. For covered property in which both you and a Loss Payee have an insurable interest: [¶] a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interests may appear. [¶] b. The Loss Payee has the right to receive loss payment even if the Loss Payee has started foreclosure or similar action on the covered property. [¶] c. If we deny your claim because of your acts or because you have failed to comply with the terms of this insurance, the Loss Payee will still have the right to receive loss payment if the Loss Payee: [¶] (1) Pays any premium due under this insurance at our request if you have failed to do so; [¶] (2) Submits a signed, sworn proof of loss within 30 days after receiving notice from us of your failure to do so; and [¶] (3) Has notified us of any change in ownership, occupancy or substantial change in risk known to the Loss Payee. [¶] All of the terms of this Coverage form will then apply directly to the Loss Payee. [¶] d. If we pay the Loss Payee for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this insurance: [¶] (1) The Loss Payee's rights will be transferred to us to the extent of the amount we pay; and [¶] (2) The Loss Payee's right to recover the full amount of the Loss Payee's claim will not be impaired. At our option, we may pay to the Loss Payee the whole principal on the debt plus any accrued interest. In this event, you will pay your remaining debt to us.

"3. If we cancel this policy, or if we do not renew this policy, we will provide written notice to the Loss Payee in the same manner and time as if notice were sent to you."

loss payable provision. Provision C, designated "CONTRACT OF SALE PROVISION," states that the loss payee is a purchaser of covered property and that for covered property in which both the insured and the loss payee have an insurable interest, Insurer will adjust losses with the insured and pay any claim jointly to the insured and the loss payee.

The policy declarations state that Bank is a loss payee under provision A only, which would make it a simple loss payee. Superior Plastic had asked Agent to provide coverage to Bank as a standard loss payee.

Superior Plastic became delinquent on its loan payments. When Bank's loan officer inspected the property in December 1999, he observed that the company was operating and had ample inventory. When the loan officer visited the property again a few days later, however, there was nobody there and most of the inventory was missing.

Bank notified Insurer of an increased risk of loss, paid premiums purportedly due, and provided a sworn proof of loss as a formal claim. Insurer denied the claim.

2. *Trial Court Proceedings*

Bank sued Insurer in June 2000 and filed an amended complaint in August 2000 alleging counts against Insurer for breach of contract (counts one and two), breach of contract based on "promissory estoppel" (count three), reformation (count four), breach of the implied covenant of good faith and fair dealing (count five), and negligence (count six), and a count against Agent for negligence (count six).

Agent and Insurer each moved for summary judgment arguing among other things that there was no covered loss and therefore no basis for relief on any count. The trial court concluded that there was a triable issue of fact whether Bank was a standard loss payee and denied both motions. The court also denied Agent's motion for reconsideration of its summary judgment motion.

Insurer moved before trial to exclude evidence of the location and condition of the personal property other than evidence that Superior Plastic removed the property, on the ground that Bank refused to comply with discovery concerning the disposition of the property. Agent joined in the motion. The court granted the motion in limine "subject to

a motion and hearing if you feel that the court should consider additional information or evidence that relates to why it should be brought in."

Insurer asked the court to reaffirm its ruling on the motion in limine before Bank's opening statement. After the parties disputed the scope of the exclusion and the merits of the motion, the court reaffirmed its prior ruling without further elaboration.

Insurer moved for a nonsuit after Bank's opening statement. Insurer argued (1) that Bank asserted no facts supporting reformation of the policy because Bank asserted no facts showing an agreement between Bank and Insurer to designate Bank a standard loss payee; (2) that the causes of action for breach of contract and breach of the implied covenant also fail because Bank as a simple loss payee was not entitled to payment; (3) that there was no covered loss under the policy regardless of whether Bank was a standard loss payee or a simple loss payee because there was no "direct physical loss or damage" to property; and (4) that Insurer owed no duty to Bank and therefore could not be liable for negligence.

Agent also moved for a nonsuit and joined in Insurer's motion. Agent argued (1) that Agent was the agent of both Insurer and Superior Plastic, but was not Bank's agent, and therefore owed no duty of care to Bank; and (2) that there was no covered loss under the policy regardless of whether Bank was a standard loss payee or a simple loss payee because there was no physical damage or destruction of property.

The court concluded that (1) Bank acknowledged in its opening statement that there was no evidence of the present condition or disposition of the property and that therefore there was no "damage or destruction" and no covered loss; (2) there was a mysterious disappearance due to intentional or dishonest acts within the policy exclusions; and (3) Bank's performance of the acts required of a standard loss payee could not convert a simple loss payee to a standard loss payee. The court therefore ordered nonsuit on all counts.

Bank moved for a new trial. The court failed to rule on the motion within the time provided by law, so the motion was denied by operation of law (Code Civ. Proc., § 660).

CONTENTIONS

Bank contends (1) the trial court erred by granting the motions for nonsuit after Bank advised the court that its opening statement did not include all of the facts on which it intended to rely at trial; (2) any doubt as to the interpretation of a loss payee provision should be resolved in favor of greater coverage, so Bank should be regarded as a standard loss payee who satisfied the conditions required of a standard loss payee; (3) the policy covers not only physical damage to the property but also loss of the property due to its unauthorized removal, so Bank as a standard loss payee is entitled to coverage for the unauthorized removal by Standard Plastic; (4) the mysterious disappearance exclusion is inapplicable; (5) Agent was an agent of Insurer, so Insurer and Agent are liable for Agent's negligent failure to procure coverage for Bank as a standard loss payee as requested; (6) Insurer is estopped to deny that Bank is a standard loss payee because Insurer or Agent as Insurer's agent accepted Bank's payment of insurance premiums; and (7) the exclusion of evidence was error because there was no adequate factual basis for Insurer's motion in limine and because Bank answered discovery concerning Bank's investigation of the missing property. Each of these contentions is based on the premise that Bank is or would be entitled to indemnity under the policy as a standard loss payee.

Insurer and Agent dispute these contentions and emphasize in particular their arguments that the loss is not within the policy's insuring clause and that the loss is specifically excluded as a "mysterious disappearance."

DISCUSSION

1. *Law Governing Nonsuit*

A defendant is entitled to a nonsuit after the plaintiff's opening statement only if the court concludes that the evidence to be presented cannot support a judgment in the plaintiff's favor as a matter of law. (*Willis v. Gordon* (1978) 20 Cal.3d 629, 632; *Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1424.) The court must accept as true all favorable facts asserted in the plaintiff's opening statement, indulge all legitimate inferences from those facts, and disregard conflicting evidence. (*Hoff v. Vacaville*

Unified School Dist. (1998) 19 Cal.4th 925, 930; *Galanek*, at p. 1424; cf. *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117-118.) We independently review the ruling on a motion for nonsuit under the same standard that governs the trial court. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542.)

A defendant moving for nonsuit must specify the precise grounds for the motion to allow the plaintiff an opportunity to cure any defects. (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 94; *John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161.) On appeal, we ordinarily consider only the grounds specified by the defendant. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839.) We may consider a ground that was not specified by the moving defendant only if it is clear that the plaintiff could not have remedied the defect. (*Lawless*, at p. 94.)

A mere " 'scintilla of evidence,' " speculation, or conjecture does not create a conflict for the jury to resolve. There must be some substance to the evidence upon which reasonable minds could differ. (*Nally v. Grace Community Church*, *supra*, 47 Cal.3d at p. 291; *Carson v. Facilities Development Co.*, *supra*, 36 Cal.3d at p. 839.)

A court may grant a motion for nonsuit after the plaintiff's opening statement only if the court, upon request, allows the plaintiff an opportunity to amend the opening statement to assert additional facts. (*Rodin v. American Can Co.* (1955) 133 Cal.App.2d 524, 534-535; see *Panico v. Truck Ins. Exchange* (2001) 90 Cal.App.4th 1294, 1299.) A plaintiff who seeks to amend its opening statement to avoid a nonsuit must request leave to amend, and waives the right to amend by failing to request leave. (*John Norton Farms, Inc. v. Todagco*, *supra*, 124 Cal.App.3d at p. 162.)

2. *The Policy States Unambiguously that Bank Is a Simple Loss Payee*

A simple loss payable clause provides that indemnity for a covered loss is payable to a secured creditor or other person holding an interest in the property, to the extent of the person's interest in the property. (*Home Savings of America v. Continental Ins. Co.* (2001) 87 Cal.App.4th 835, 842; 4 Couch on Insurance (3d ed. 1997) §§ 65:8-65:9,

pp. 65-16 to 65-19.) A simple loss payee is simply an appointee to receive payment, and is entitled to indemnity under the policy only if the insured is entitled to indemnity. Any defense to coverage based on an act or omission of the insured bars recovery by a simple loss payee as well. (*Home Savings*, at p. 842; Couch, *supra*, § 65:15 at pp. 65-24 to 65-25.)

A standard loss payable clause provides greater protection to the loss payee. A standard loss payable clause provides that indemnity for a covered loss is payable to a secured creditor or other person holding an interest in the property, to the extent of the person's interest in the property, regardless of any act or neglect by the insured. (*Home Savings of America v. Continental Ins. Co.*, *supra*, 87 Cal.App.4th at pp. 842-843; 4 Couch on Insurance, *supra*, §§ 65:8-65:9, pp. 65-16 to 65-19.) Unlike a simple loss payable clause, a standard loss payable clause creates a separate, enforceable contract between the insurer and loss payee. (*Home Savings*, at p. 842; *Mosee v. Firemen's Ins. of Newark* (1927) 87 Cal.App. 473, 476; Couch, *supra*, § 65:32 at pp. 65-47 to 65-50.) A standard loss payee is entitled to indemnity under the policy regardless of any defenses to coverage based on an act or omission of the insured. (*Home Savings*, at p. 842; Couch, *supra*, § 65:48, pp. 65:71 to 65:74.)

We interpret an insurance policy using the ordinary rules of contract interpretation. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) The mutual intention of the parties to the contract at the time the contract was formed governs. (Civ. Code, § 1636; *Palmer*, at p. 1115.) We ascertain that intention solely from the written contract, if possible. (Civ. Code, § 1639; *Palmer*, at p. 1115.) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (Civ. Code, § 1638; *Palmer*, at p. 1115.) Contractual language is ambiguous and there is no plain meaning only if the language is susceptible of more than one reasonable interpretation. (*Palmer*, at p. 1115.)

The policy here provides three alternative loss payable provisions, discussed *ante*. Provision B is a standard loss payable provision stating that the loss payee is entitled to

payment for a covered loss even if the insured is not covered due to the insured's acts or failure to comply with the policy, provided that the loss payee satisfies certain conditions. Provision A is a simple loss payable provision stating that Insurer will deliver payment on the insured's claim to the loss payee only after adjusting losses with the insured. The policy declarations clearly state that Bank is a loss payee under provision A.

Bank contends we should resolve any doubt as to the proper interpretation of the loss payable provision in favor of a standard loss payable provision. Yet Bank identifies no purported ambiguity in provision A or in the designation of Bank as a loss payee under provision A. We see no ambiguity and have no doubt that the policy provides that Bank is only a simple loss payee. We therefore conclude that nonsuit was proper as to the counts for ordinary breach of contract.[3]

3. *Bank Has Shown No Grounds for Reformation*

Bank does not discuss the law of reformation (see Civ. Code, § 3399) in its appellate briefs. Bank cites cases stating that a standard loss payee who complies with the policy conditions is entitled to coverage as a standard loss payee, but does not explain why under the law of reformation a simple loss payee who plays the role of a standard loss payee by performing the acts required of a standard loss payee should become a standard loss payee. Absent persuasive authority for this proposition, we conclude that nonsuit was proper as to the reformation count (count four).

4. *The Basic Grant of Coverage Extends to Physical Loss of the Property Apart from Physical Damage*

Insurer and Agent moved for nonsuit against the remaining counts based largely on the argument that the loss is not within the policy's insuring clause regardless of whether Bank is a standard loss payee or a simple loss payee. They maintain that "direct

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[3] We regard both count one labeled "Money for Failure to Pay Monetary Benefits Under Insurance Contract" and count two labeled "Damages for Breach of Insurance Contract" as ordinary counts for breach of contract. We address the third count labeled "Damages for Breach of Insurance Contract, Waiver and Promissory Estoppel" *post*.

physical loss or damage" encompasses only physical damage or destruction of property and perhaps theft from Superior Plastic. We conclude that the insuring clause extends to physical loss apart from physical damage and theft.

An insured seeking to recover under an insurance policy bears the burden to show that the loss is within the basic grant of coverage. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188.) When the insured makes that showing, the burden shifts to the insurer to show that an exclusion applies. (*Ibid*.)

The policy here states that Superior Plastic's personal property "is insured against the risk of direct physical loss or damage by any cause of loss except those under Comprehensive Protection—Exclusions." Thus, the basic grant of coverage includes "direct physical loss" of personal property. The policy expressly provides coverage for risks of loss by any cause, excepting only causes specifically excluded.

The plain meaning of "direct physical loss" encompasses physical displacement or loss of physical possession. That the loss must be "physical" distinguishes the loss from some other, incorporeal loss. The ordinary meaning of "direct physical loss" is not the same as that of "direct physical damage," and the use of the terms "loss" and "damage" in the context of the insuring clause does not suggest that the terms are synonymous. We conclude that the physical loss of personal property here was within the basic grant of coverage. (See *Eott Energy Corp. v. Storebrand Internat. Ins. Co.* (1996) 45 Cal.App.4th 565, 569 [coverage against " 'all risks of direct physical loss or damage' " included theft losses]; *Great Northern Ins. Co. v. Dayco Corp.* (S.D.N.Y. 1985) 620 F.Supp. 346, 351 [coverage against " 'direct *physical* loss . . . to property' " included physical dispossession by theft].)

An insured's intentional taking of property ordinarily is expressly excluded as a cause of loss and is excluded by operation of law (Ins. Code, § 533). It therefore may be common, albeit inaccurate, to state that the only physical loss within an insuring clause is theft. The insuring clause here provides coverage for "direct physical loss" by any cause other than those expressly excluded, however, and is not limited to theft. Whether an

"intentional acts" or similar exclusion applies is another question. The policy's "dishonest act" exclusion and Insurance Code section 533 would preclude coverage for Superior Plastic if Superior Plastic removed its own property to avoid its debt obligation. If Bank was only a simple loss payee with no greater rights under the policy than Superior Plastic, Bank would not be entitled to payment. If Bank was a standard loss payee, however, the exclusion for Superior Plastic's dishonest act or intentional act would not apply to Bank, as discussed *ante*.

5. *The Defendants Have Not Shown that the Loss Resulted from a Mysterious Disappearance*

Insurer and Agent did not argue in support of their motions for nonsuit that the mysterious disappearance exclusion applies, so they are not entitled to nonsuit on that ground unless it is clear that the exclusion applies and that Bank cannot establish at trial that the exclusion is inapplicable. (*Carson v. Facilities Development Co.*, *supra*, 36 Cal.3d at p. 839.) We conclude that, for purposes of nonsuit, the defendants have not established that the exclusion applies.

The policy excludes coverage for loss or damage caused by a "[m]ysterious disappearance of property or an inventory shortage." The policy does not define these terms.

The ordinary meaning of a mysterious disappearance of property is that the property disappeared with no apparent explanation for the manner of its disappearance. (See *Blasiar, Inc. v. Fireman's Fund Ins. Co.* (1999) 76 Cal.App.4th 748, 757 [the purpose of a mysterious disappearance exclusion is "to exclude unexplained losses"]; 15 Appleman on Insurance (Holmes ed. 2000) § 111.2, p. 136.) A disappearance is mysterious only if the cause of the disappearance is unknown. For example, a broken car window and missing stereo equipment ordinarily indicate that the equipment was stolen. Although the identity of the thief may be unknown, the cause of the loss is known. Whether a disappearance resulted from a known cause or from an unknown, mysterious

cause ordinarily is a question of fact, unless the evidence reasonably can support only one conclusion.

Bank stated in its opening statement that its loan officer visited Superior Plastic's manufacturing plant in December 1999, observed the plant in full operation with ample inventory, and then returned a few days later only to find nobody there and most of the inventory and all of the records missing. Bank stated that its investigation revealed "no information what happened to those assets."

Although Bank in its opening statement offered no explanation as to what happened to the property, the parties and the court acknowledged the existence of evidence that Superior Plastic removed the property. Insurer in its motion in limine quoted the deposition testimony of Bank's investigator stating that he believed that Superior Plastic's owner and employees removed the property. In light of that evidence, Insurer in its motion to exclude evidence of the location and condition of the property expressly did not move to exclude evidence that Superior Plastic removed the property. Acknowledging that exception to the motion in limine, the court stated immediately before Bank's opening statement, while discussing the prior ruling on the motion in limine, that a former Superior Plastic employee had testified about the removal. Insurer agreed that the former employee testified that Superior Plastic removed its own property, and argued that there was no evidence that the property was either damaged or stolen by a third party.

If the evidence at trial shows that Superior Plastic removed its own property, then there is a known cause for the disappearance of the property and there was no mysterious disappearance. On this record, we therefore cannot affirm the nonsuits based on the mysterious disappearance exclusion.

6. *Insurer Is Not Entitled to Nonsuit Against Count Three for Breach of Contract Based on Estoppel or Count Five for Breach of the Implied Covenant of Good Faith and Fair Dealing*

"The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.]" (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.) The detrimental reliance must be reasonable. (*Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 938.)

An insurer may be equitably estopped from denying coverage if these elements are satisfied, with the result that the claimant will be entitled to the coverage that it was misled to believe existed. (*Granco Steel, Inc. v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 191, 203-204; *Hartford Fire Ins. Co. v. Spartan Realty International, Inc.* (1987) 196 Cal.App.3d 1320, 1325.) The determination of equitable estoppel ordinarily is a question of fact for the trier of fact, unless the facts are undisputed and can support only one reasonable conclusion. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319; *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 266.) A plaintiff who relies on estoppel generally must plead the facts supporting each element of estoppel. (*Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 947-948.) Bank attempted to plead the elements of equitable estoppel in its third count, mislabeled "Damages for Breach of Insurance Contract, Waiver and Promissory Estoppel."

Insurer did not argue in its motion for nonsuit that Bank cannot establish the elements of equitable estoppel and has not shown on appeal that there is an incurable

defect in Bank's count based on equitable estoppel, and therefore is not entitled to nonsuit against that count. (*Carson v. Facilities Development Co.*, *supra*, 36 Cal.3d at p. 839.) Moreover, the facts asserted in Bank's opening statement and reasonable inferences from those facts are sufficient to support the count. Bank stated that Superior Plastic agreed to purchase insurance designating Bank a standard loss payee and that Bank and Superior Plastic asked Agent to ensure that Bank was designated a standard loss payee. Bank stated that Agent failed to comply with those requests and failed to inform Bank that it was only a simple loss payee, and that Bank was unaware that it was designated only a simple loss payee. These facts and the inference that Agent was acting as Insurer's agent support each required element of equitable estoppel in that, allegedly (1) Insurer through Agent was apprised of the fact that Bank and Superior Plastic had requested Bank's designation as a standard loss payee; (2) Bank had a right to believe that Insurer or Agent intended that Bank would rely on Agent's failure to inform Bank that Agent had not complied with the requests; (3) Bank was unaware that the policy designated it only a simple loss payee; and (4) Bank relied on Insurer's and Agent's acts and omissions to its detriment.

A breach of the implied covenant of good faith and fair dealing can arise only if the insured was entitled to coverage under the policy. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 35-36.) Insurer argued in its motion for nonsuit that it could not be held liable for breach of the implied covenant because Bank was not entitled to coverage under the policy. Insured argued that Bank was not entitled to payment as a simple loss payee and that even if Bank were a standard loss payee, there was no covered loss under the policy because there was no "direct physical loss or damage" to property. In light of our conclusions that the policy coverage extends to physical loss of the property apart from physical damage and that Bank may establish coverage based on equitable estoppel, we conclude that Insurer has not established a basis for nonsuit against the count for breach of the implied covenant. We therefore reverse the nonsuit against the fifth count for breach of the implied covenant.

7. *The Defendants Are Not Entitled to Nonsuit Against the Negligence Count*

a. *Legal Framework*

An insurance agent is the agent of the insurer, while an insurance broker is the agent of the person seeking insurance. (Ins. Code, §§ 31, 33.) Whether an insurance salesperson acts as an agent or a broker depends on the facts. The labels used are not determinative. (*Maloney v. Rhode Island Ins. Co.* (1953) 115 Cal.App.2d 238, 245.)

An insurance agent acting on behalf of an insurer and the insurer may be held liable for negligence in some circumstances if the agent agreed with the insured to procure certain insurance but failed to do so, and failed to advise the insured that the insurance obtained was not the insurance agreed upon or misrepresented the coverage provided. (*Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1464-1465; *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1118-1121; see also *Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 691-692; *Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382-383 [held that only the insurer could be held liable, and not the agent].) The scope of the agent's duty depends on the facts. (*Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1104.)

Bank stated in its opening statement that Superior Plastic agreed to purchase insurance designating Bank a standard loss payee, that Bank and Superior Plastic asked Agent to ensure that Bank was designated a standard loss payee, and that Agent failed to do so and failed to inform Bank that Bank was only a simple loss payee. The essence of Bank's negligence claim is that both Insurer and Agent are liable for Agent's negligent failure to procure the requested insurance.

b. *Insurer Is Not Entitled to Nonsuit Against the Negligence Count*

Insurer's motion for nonsuit did not squarely address the principal basis of the negligence claim. Insurer argued that it cannot be held liable for negligence because it owed Bank no duty of care with respect to alleged "negligent claims adjusting" and that there is "no duty in law for insurer to make sure that an insured gets the coverages it requires to operate its business." Insurer also argued that Bank cannot establish damages

for any cause of action because there is no evidence of a direct physical loss or damage, an argument that we have rejected *ante* as a basis for nonsuit. These arguments do not address the claim that Insurer is liable for Agent's failure to exercise due care to provide the requested insurance coverage. Insurer did not argue that Agent was not Insurer's agent as a matter of law or that there was no evidence that Agent was Insurer's agent, and did not otherwise show that Bank cannot establish its negligence claim. We therefore conclude that Insurer is not entitled to nonsuit against the sixth count for negligence.

c. *Agent Is Not Entitled to Nonsuit Against the Negligence Count*

Agent argued in its motion for nonsuit that Agent was Insurer's agent, not Bank's agent, and therefore owed no duty of care to Bank. Agent also argued that there is no evidence of a direct physical loss or damage, an argument that we have rejected as a basis for nonsuit. Agent's motion was based on the erroneous premise that an insurance agent can owe no duty of care to a person other than the agent's principal, and disregarded the law that an insurer's agent can be held liable to a person requesting insurance in some circumstances as stated *ante*. Agent's ground asserted for nonsuit is legally erroneous and cannot support a nonsuit.

Agent argues on appeal that expert testimony is required to establish the standard of care and that Bank has no expert testimony and therefore no evidence to establish the standard of care. Agent did not argue below that expert testimony is required to establish the standard of care, but only argued that Bank had not designated an expert to testify. Agent made this argument only in passing and did not clearly assert it as a ground for nonsuit, and therefore is not entitled to nonsuit on this ground. (*Lawless v. Calaway*, *supra*, 24 Cal.2d at p. 94; *John Norton Farms, Inc. v. Todagco*, *supra*, 124 Cal.App.3d at p. 161.)

DISPOSITION

The judgment is affirmed as to counts one, two, and four, and reversed as to counts three, five, and six. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.